

FILED

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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

INUNC PRO TUNC

MAY 20 2008

BY: *[Signature]*

DEPUTY

1 Chad McKinney
2 Pro Se
3 6266 Madeline St Apt #61
4 San Diego, CA 92115
5 619-634-3566

4 **THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA**

5 CHAD MCKINNEY, an individual,

9 Plaintiff,

13 v.

14 APOLLO GROUP INC., UNIVERSITY OF
15 PHOENIX, a Corporation, MECHELLE
16 BONILLA, an Enrollment Manager at
17 UNIVERSITY OF PHOENIX, KYAN
18 FLYNN, Director of Enrollment at
19 UNIVERSITY OF PHOENIX, APRIL
20 ALCORN, an Employee Relations
21 Consultant at UNIVERSITY OF PHOENIX
22 CARLYN LINDSTEN, Associate Director of
23 Enrollment at UNIVERSITY OF PHOENIX

23 Defendants

) CIV. Case No.07-cv-2373
)
) FOR VIOLATION OF FEDERAL
) FALSE CLAIMS ACT AND FOR
) VIOLATION OF THE
) THE CIVIL RIGHTS ACT 1964 AND
) THE AMENDMENTS TO TITLE
) VII OF THE CIVIL RIGHTS ACT OF
) 1991

) RETALIATION- WRONGFUL
) TERMINATION &
) EMPLOYMENT DISCRIMINATION
) CIVIL ACTION

) **PLAINTIFF'S REPLY TO DEFENDANT'S**
) **NOTICE OF MOTION AND**
) **MOTION TO DISMISS PLAINTIFF'S**
) **COMPLAINT, OR, IN THE**
) **ALTERNATIVE, MOTION FOR MORE**
) **DEFINITE STATEMENT**

) ***NO ORAL ARGUMENT, UNLESS***
) ***REQUESTED BY THE COURT.***

) Date: April 7, 2008

) Time: 11:00 a.m.

) Courtroom: 4

) Judge: Hon. William Q. Hayes

) Demand for Trial by Jury Pursuant
) to U.S. Constitution, 7th Amendment
) May 20, 2008

PLAINTIFF'S REPLY TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT, OR, IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT AND MOTION TO SET ASIDE ENTRY OF DEFAULT

I.

INTRODUCTION

The Plaintiff searched the Court's Docket record of the case several times through, and was unable to locate Apollo's resubmission of its "Notice of Motion and Motion to Dismiss Plaintiff's Complaint, or, in the Alternative, Motion for More Definite Statement" ("Motion to Dismiss") after it was originally stricken from the Court records on the 19th of March, 2008. However, the Defendant submitted a "Notice of Non-Opposition to the Motion to Dismiss Plaintiff's Complaint, or, in the Alternative, Motion for More Definite Statement" anyways. Hence, the Plaintiff is not required by any Federal Rule of Civil Procedure to respond to a stricken document, and the Defendant's "Notice of Non-Opposition to the Motion to Dismiss Plaintiff's Complaint, or, in the Alternative, Motion for More Definite Statement" should be stricken from the Court records. If this is an oversight by the Plaintiff, he offers his sincerest apologies, and would respond to the Defendant's Motion to Dismiss as follows:

The Defendants' "Motion to Dismiss Plaintiff's Complaint, or, in the Alternative, Motion for More Definite Statement and Motion to Set Aside Entry of Default" states that the Court should dismiss the Plaintiff's complaint on the following grounds: "(1) The Court lacks jurisdiction over Apollo since they were never properly served in this matter; (2) The Complaint fails to state any claims upon which relief may be granted; (3) The Complaint fails to set forth a short and plain statement of the claim showing that the plaintiff is entitled to relief; and (4) The Complaint is so vague and ambiguous so as to require plaintiff to provide a more definite statement." The Plaintiff was forced to attain a copy of the Defendants' Motion

1 more definite statement.” The Plaintiff was forced to attain a copy of the Defendants’ Motion
2 to Dismiss by printing his own copy at the Clerk’s office (please see Exhibit A, “Notice of
3 “Motion to Dismiss Plaintiff’s Complaint, or in the Alternative, Motion for More Definite
4 Statement and Motion to Set Aside Entry of Default” and Exhibit B, “Apollo Group, Inc.’s
5 Memorandum of Points and Authorities in Support of Motion to Dismiss Plaintiff’s
6 Complaint, or in the Alternative, Motion for More Definite Statement”).)

7 **II.**

8 **THE COURT DOES NOT LACK JURISDICTION OVER APOLLO SINCE IT WAS**
9 **PROPERLY SERVED IN ACCORDANCE TO THE FEDERAL RULES OF CIVIL**
10 **PROCEDURE**

11 The defendant was served at its San Diego office by professional certified service processor
12 Mr. R. T. Hansell. The Defendant was properly served, henceforth is subject to the
13 jurisdiction of the Court. Apollo did in fact receive proper service as can be evidenced by
14 Exhibit C (Please see Exhibit C, entitled “Declaration of R.T. Hansell in Support of Plaintiff’s
15 Motion for Default Judgment”).

16 **III.**

17 **THE COMPLAINT DOES STATE CLAIMS UPON WHICH RELIEF MAY BE**
18 **GRANTED**

19 The Complaint does state claims upon which relief may be granted, and are enumerated as
20 seven causes of action listed on page 16 to page 17, in the section entitled “Legal Claims” of
21 the Plaintiff’s Original Complaint.
22
23
24

1 IV.

2 **THE COMPLAINT DOES SET FORTH A SHORT AND PLAIN STATEMENT OF**
3 **EACH CLAIM SHOWING THAT THE PLAINTIFF IS ENTITLED TO RELIEF**

4 The Complaint does set forth a short and plain statement of each claim showing that the
5 Plaintiff is entitled to relief. The defendants' showing of malice is demonstrated by the
6 manner in which the employee was fired (Please see pages 10-16, Statement of facts 19-42, of
7 the Plaintiff's "Original Complaint", filed with the Court on the 19th of December, 2007.

8 V.

9 **THE COMPLAINT IS NOT VAGUE, AND A MORE DEFINITE STATEMENT IS**
10 **NOT NEEDED**

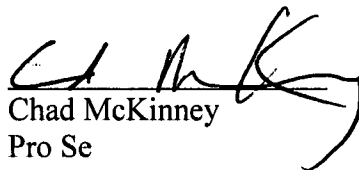
11 The Complaint is not vague, and a more definite statement is not needed. The Original
12 Complaint should be comprehensible to any reasonable person as it describes in detail the
13 Plaintiff's complaint with the Defendants. This is effectively and comprehensibly
14 communicated in the Plaintiff's Original Complaint, pages 2 through 18, and is listed as the
15 following sections: Statement of the Case; Jurisdiction; Venue; Timeliness of Petition; Parties;
16 Statement of Facts; Legal Claims; Conclusion; and Relief Requested

17
18
19 VI.

20 **CONCLUSION**

21 Wherefore, the Plaintiff respectfully moves the Court to Reject the Defendant's
22 "Motion to Dismiss Plaintiff's Complaint, or, in the Alternative, Motion for More Definite
23 Statement" and uphold the Clerk's Entry of a Default Judgment.
24

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Chad McKinney', is written over the printed name.

Chad McKinney
Pro Se
6266 Madeline St Apt #61
San Diego, CA 92115
619-634-3566

1 Chad McKinney
Pro Se
2 6266 Madeline St Apt #61
San Diego, CA 92115
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4 **THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA**

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) **PLAINTIFF'S MEMORANDUM OF**
) **POINTS AND AUTHORITIES IN**
) **SUPPORT OF REPLY TO APOLLO'S**
) **MOTION TO DISMISS PLAINTIFF'S**
) **COMPLAINT, OR, IN THE**
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) **DEFINITE STATEMENT**

) ***NO ORAL ARGUMENT, UNLESS***
) ***REQUESTED BY THE COURT***

) Date: May 12, 2008

) Time: 11:00 a.m.

) Courtroom: 4

) Judge: Hon. William Q. Hayes

) Demand for Trial by Jury Pursuant
) to U.S. Constitution, 7th Amendment
) May 20, 2008

**PLAINTIFF'S MEMORANDUM OF POINTSS AND AUTHORITIES IN SUPPORT
OF PLAINTIFF'S REPLY TO APOLLO'S MOTION TO DISMISS PLAINTIFF'S
COMPLAINT, OR, IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE
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INTRODUCTION

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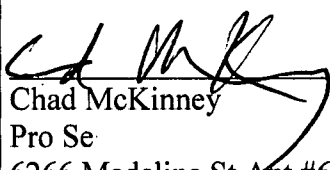
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20 **CONCLUSION**

21 Wherefore, the Plaintiff respectfully moves the Court to Reject the Defendant's
22 "Motion to Dismiss Plaintiff's Complaint, or, in the Alternative, Motion for More Definite
23 Statement" and uphold the Clerk's Entry of a Default Judgment.

1
2
3 Respectfully submitted,
4

5 
6 Chad McKinney
7 Pro Se
8 6266 Madeline St Apt #61
9 San Diego, CA 92115
10 619-634-3566
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CERTIFICATE OF SERVICE

I, Chad McKinney, hereby certify that on, May 20, 2008, I served copies of the Plaintiff's Notice, Motion, Memorandums of Points and Authorities, and appendices to the Court and the following parties by way of United States Postal Service First Class Priority Mail:

Snell & Wilmer L.L.P.
Attention of: Nathan W. Hicks
600 Anton Boulevard, Suite 1400.
Costa Mesa, CA 92626

5/20/08
Date

Chad McKinney
Chad McKinney

The United States District Court Southern District of California

1 Chad McKinney
2 Pro Se
3 6266 Madeline St Apt #61
4 San Diego, CA 92115
5 619-634-3566

6 **THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA**

7 **May 20, 2008**

8 **BY HAND DELIVERY**

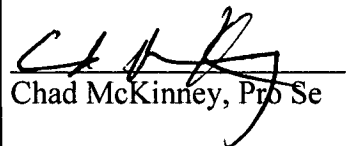
9 The Honorable Judge William Q. Hayes
10 Referred to: Magistrate Judge Cathy Ann Bencivengo
11 330 West Broadway, San Diego
12 CA 92101-3827

13 Re: McKinney v. Apollo Group Inc., *et al*
14 Civil Action 07-cv-2373

15 Dear Judge Hayes,

16 Enclosed is a courtesy copy of the Plaintiff's Notice, Motions, Memorandums of Points and Authorities,
17 and appendices to the Court. This was hand delivered with the Clerk today.

18 Respectfully,

19 
20 Chad McKinney, Pro Se

21 Cc: Snell & Wilmer L.L.P.; Attention of: Nathan W. Hicks
22
23
24

EXHIBIT A

Christy D. Joseph (#136785)
 cjoseph@swlaw.com
 Nathan W. Hicks (#236269)
 nhicks@swlaw.com
 SNELL & WILMER L.L.P.
 600 Anton Boulevard, Suite 1400
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Attorneys for Defendants Apollo Group, Inc.

UNITED STATES DISTRICT COURT – SOUTHERN DISTRICT OF
 CALIFORNIA

CHAD MCKINNEY, an individual,
 Plaintiff,

v.

APOLLO GROUP, INC.,
 UNIVERSITY OF PHOENIX, a
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 BONILLA, an Enrollment Manager
 at UNIVERSITY OF PHOENIX,
 KYAN FLYNN, Director of
 Enrollment at UNIVERSITY OF
 PHOENIX, APRIL ALCORN, an
 Employees Relations Consultant at
 UNIVERSITY OF PHOENIX,
 CARLYN LINDSTEN, Associate
 Director of Enrollment at
 UNIVERSITY OF PHOENIX

Defendants

CASE NO. 07-CV-2373 WQH CAB

**NOTICE OF MOTION AND
 MOTION TO DISMISS
 PLAINTIFF'S COMPLAINT, OR, IN
 THE ALTERNATIVE, MOTION
 FOR MORE DEFINITE
 STATEMENT**

[FRCP 12(b)(2); 12(b)(5); 12(b)(6);
 12(e).]

**NO ORAL ARGUMENT, UNLESS
 REQUESTED BY THE COURT**

Date: April 7, 2008
 Time: 11:00 a.m.
 Courtroom: 4
 Judge: Hon. William Q. Hayes

DATE OF FILING: December 19, 2007

\\HICKS\NSWDMS\8625669

USDC-SOUTHERN DISTRICT CALIFORNIA
 CASE NO. 07-CV-2373 WQH CAB

NOTICE OF MOTION AND MOTION TO DISMISS OR FOR MORE DEFINITE STATEMENT

Snell & Wilmer

LLP
 LAW OFFICES
 600 Anton Boulevard, Suite 1400
 Costa Mesa, California 92626-7689
 (714) 427-7000

1
2 TO PLAINTIFF AND HIS ATTORNEY(S) OF RECORD:

3 PLEASE TAKE NOTICE that on April 7, 2008 at 11:00 a.m., or as soon
4 thereafter as counsel may be heard by the above entitled Court, located at 940 Front
5 Street, San Diego, California 92101, Courtroom 4, defendant Apollo Group, Inc.
6 ("Apollo") will and hereby does move the Court pursuant to Rules 12(b)(2);
7 12(b)(5); 12(b)6; and 12(e) of the Federal Rules of Civil Procedure ("FRCP") to
8 dismiss plaintiff's complaint with prejudice or in the alternative require a more
9 definite statement.

10 This motion is brought on the following grounds: (1) The Court lacks
11 jurisdiction over Apollo since it was never properly served in this matter; (2) The
12 Complaint fails to state any claims upon which relief may be granted; (3) The
13 Complaint fails to set forth a short and plain statement of the claim showing that the
14 [plaintiff] is entitled to relief; and (4) The Complaint is so vague and ambiguous so
15 as to require plaintiff to provide a more definite statement.

16 This motion is based on this notice of motion and motion, the memorandum
17 of points and authorities, the declaration of Nathan W. Hicks filed herewith, and
18 supporting exhibit thereto, the Court's files in this matter, all supporting documents,
19 evidence and oral argument before this Court at the time of the hearing, and any
20 other matter properly before the Court.

21 Date: March 7, 2008

SNELL & WILMER L.L.P.

22
23 By: 

Christy Joseph

Nathan W. Hicks

Attorneys for Apollo Group, Inc.

PROOF OF SERVICE*USDC – Southern District, Case No. 07-CV-2373 WQH CAB*

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, California 92626.

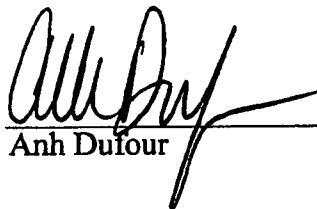
On March 7, 2008, I served, in the manner indicated below, the foregoing document described as **NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT, OR, IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

Chad McKinney Pro Se 6266 Madeline Street, Apt. #61 San Diego, CA 92115	Plaintiff Tel: 619-634-3566
United States District Court Attention: Hon. Judge William Q. Hayes 940 Front Street San Diego, CA 92101	

☒ **BY FEDERAL EXPRESS:** I caused such envelopes to be delivered by air courier, with next day service, to the offices of the addressees. (C.C.P. § 1013(c)(d)).

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 7, 2008, at Costa Mesa, California.


Anh Dufour

8626180

PROOF OF SERVICE

EXHIBIT B

Christy D. Joseph (#136785)
cjoseph@swlaw.com
Nathan W. Hicks (#236269)
nhicks@swlaw.com
SNELL & WILMER L.L.P.
600 Anton Boulevard, Suite 1400
Costa Mesa, CA 92626-7689
Telephone: (714) 427-7000
Facsimile: (714) 427-7799

Attorneys for Defendant Apollo Group, Inc.

UNITED STATES DISTRICT COURT – SOUTHERN DISTRICT OF
CALIFORNIA

CHAD MCKINNEY, an individual,
Plaintiff,

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Director of Enrollment at
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Defendants

CASE NO. 07-CV-2373 WQH CAB

**APOLLO GROUP, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS
PLAINTIFF'S COMPLAINT, OR, IN
THE ALTERNATIVE, MOTION
FOR MORE DEFINITE
STATEMENT**

**[FRCP 12(b)(2); 12(b)(5); 12(b)(6);
12(e).]**

Date: April 7, 2008
Time: 11:00 a.m.
Courtroom: 4
Judge: Hon. William Q. Hayes

**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**

DATE OF FILING: December 19, 2007

WICKS\NSWDMS\B623187

USDC-SOUTHERN DISTRICT CALIFORNIA
CASE NO. 07-CV-2373 WQH CAB

MPA IN SUPPORT OF MOTION TO DISMISS OR FOR MORE DEFINITE STATEMENT

Snell & Wilmer

L.L.P.
LAW OFFICES
600 Anton Boulevard, Suite 1400
Costa Mesa, California 92626-7689
(714) 427-7000

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Snell & Wilmer

LAW OFFICES
600 Anton Boulevard, Suite 1400
Costa Mesa, California 92626-7689
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13	Federal Rules of Civil Procedure Rule 12(b)(5)	3, 5
14	Federal Rules of Civil Procedure Rule 12(b)(6)	3, 12
15	Federal Rules of Civil Procedure Rule 12(e)	3, 13
16	Federal Rules of Civil Procedure Rule 4	2, 4
17	Federal Rules of Civil Procedure Rule 4(a)	5
18	Federal Rules of Civil Procedure Rule 4(e)	2
19	Federal Rules of Civil Procedure Rule 4(h)	5
20	Federal Rules of Civil Procedure Rule 4(h)(1)	4
21	Federal Rules of Civil Procedure Rule 8	3, 11, 13
22	Federal Rules of Civil Procedure Rule 8(a)(2)	11
23	Federal Rules of Civil Procedure Rule 8(e)(2)	11
24	Federal Rules of Civil Procedure Rule 41(b)	12, 13

OTHER AUTHORITIES

25		
26	2 James Wm. Moore, et al., Moore's Federal Practice,	
27	12.36[1] (3d ed. 2000)	13

I.

INTRODUCTION

Plaintiff Chad McKinney ("McKinney"), a *pro se* litigant, has brought the instant action against Apollo Group, Inc., (erroneously sued as Apollo Group, Inc., University of Phoenix, a Corporation),¹ an Arizona corporation (hereafter, "Apollo"), and four individual defendants.² The Court should dismiss the Complaint for three separate reasons. First, McKinney failed to properly serve Apollo in accordance with Rule 4 of the Federal Rules of Civil Procedure ("FRCP") because McKinney did not deliver a copy of the summons and complaint to an officer, managing agent, general manager or an authorized agent for service of process. Although some procedural rules may be relaxed for *pro se* litigants, all plaintiffs must follow the rules for service of the complaint. *See Graham v. United States*, 79 Fed. Appx. 992, 994, No. 03-15240, 2003 WL 22514528, at *1 (9th Cir. June 2, 2003). This procedural step is important not only to ensure due process, but also for jurisdictional reasons, because absent proper service, a court lacks jurisdiction over the defendant. Accordingly, the Complaint should also be dismissed because the Court lacks personal jurisdiction over Apollo.

Finally, McKinney's Complaint should be dismissed for failure to state a claim upon which relief can be granted. The caption of McKinney's Complaint states that it is "for violation of Federal False Claims Act and for violation of the Civil Rights Act 1964 and the amendments to Title VII of the Civil Rights Act of 1991-Retliation-Wrongful Termination & Employment Discrimination Civil Action" and lists seven causes of action:

1. Retaliation pursuant to the False Claims Act § 3729;

¹ McKinney also describes Apollo as "Apollo Group Inc, a.k.a. the University of Phoenix" in his Motion for Entry of Default and supporting memorandum of points and authorities. [Motion for Entry of Default, 2:4-6; MPA In Support of Entry of Default, 2:4-6.]

² As of the date this motion was filed, none of the individual defendants have been properly served pursuant to FRCP Rule 4(e).

2. Retaliation under Title VII;
3. Wrongful Termination;
4. False Imprisonment;
5. Intentional Infliction of Emotional Distress;
6. Defamation; and
7. Equal Pay.

The Complaint, however, contains no comprehensible recitation of facts or the basis for any of McKinney's purported claims, nor does it give Apollo fair notice of its purported acts or omissions, what actions are attributed to what defendants, how Apollo's conduct damaged McKinney, or even what damage McKinney suffered.

Accordingly, Apollo brings this motion to dismiss McKinney's Complaint or to quash service of summons pursuant to FRCP Rule 12(b)(5) because the Complaint was improperly served. Apollo also brings this motion to dismiss pursuant to FRCP Rule 12(b)(2) because the Court lacks personal jurisdiction over Apollo as a result of McKinney's insufficient service. Additionally, Apollo brings this motion pursuant to Rule 12(b)(6) because the Complaint fails to state a claim upon which relief may be granted and fails to comply with FRCP Rule 8. In the alternative, if the Court declines to dismiss the Complaint for failure to state a claim and either finds that service was proper or quashes service and requires McKinney to re-serve an amended Complaint, Apollo requests that the Court order McKinney to file a more definite statement pursuant to FRCP Rule 12(e).

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II.

THE COURT LACKS JURISDICTION OVER APOLLO BECAUSE
PLAINTIFF'S SERVICE WAS DEFECTIVE (FRCP 12(B)(2); 12(B)(5)).

FRCP Rule 4 provides in pertinent part:

Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) In a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant....

Belle v. Chase Home Finance, LLC, No. 06CV2454 WQH (LSP), 2007 WL 3232505, at *8 (S.D. Cal. May 22, 2007). To that end, California state law allows for service upon a corporation by delivering a copy of the summons and complaint:

(a) To the person designated as agent for service of process...;

[or]

(b) To the president or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized by the corporation to receive service of process.

Cal. Civ. Proc. Code § 416.10.

Thus, under both federal and state law, service of summons upon a corporation is only proper if delivered to an officer, general manager or designated agent for service of process. *See id.*; FRCP Rule 4(h)(1). When a defendant challenges service of process, a plaintiff bears the burden of showing that service is valid under Rule 4. *Brockmeyer v. May*, 383 F.3d 798, 800 (9th Cir. 2004); *Belle, supra*, citing *Hirsh v. Blue Cross, Blue Shield*, 800 F.2d 1474, 1477 (9th Cir. 1986).

Moreover, if a plaintiff fails to serve a defendant in accordance with Rule 4, the court lacks jurisdiction over that defendant. *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982).

McKinney failed to comply with the requirements of FRCP Rule 4(h) and California law because he did not serve the summons and complaint on an officer, general manager or designated agent for service of process for Apollo. Indeed, McKinney failed to even direct the summons and Complaint to any individual at all as required by FRCP Rule 4(a). Instead, McKinney simply dropped off an envelope to UOP employee, Ellen Bowens, and expected this to constitute sufficient service of process upon Apollo. This is unacceptable under California law and the Federal Rules.

While procedural rules may be relaxed for *pro se* litigants, even a *pro se* plaintiff must comply with the rules for service of process. *See Graham v. United States*, 79 Fed. Appx. 992, 994, No. 03-15240, 2003 WL 22514528, at *1 (9th Cir. June 2, 2003) citing *Hamilton v. Endell*, 981 F. 2d 1062, 1065 (9th Cir. 1992) (abrogated on other grounds by *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1045 (9th Cir. 2002).

Additionally, because McKinney did not properly serve Apollo, the Court lacks personal jurisdiction over it, and the Complaint should be dismissed pursuant to FRCP Rules 12(b)(2) and 12(b)(5) for this reason.

III.

THE COURT SHOULD DISMISS THE COMPLAINT BECAUSE IT FAILS TO PROVIDE A BASIS UPON WHICH RELIEF CAN BE GRANTED.

A. The Court May Dismiss Patently Defective Complaints.

A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. The Court may dismiss a complaint as a matter of law either for lack of a cognizable theory or the absence of sufficient facts alleged under a cognizable

1 legal theory. *Roberston v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir.
2 1984). Thus, the Court should dismiss a claim if “it appears beyond doubt that the
3 plaintiff can prove no set of facts in support of his claim which would entitle him to
4 relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In making this
5 determination, the Court must accept as true all material allegations in the
6 complaint and draw all reasonable inferences in the plaintiff’s favor. *Usher v. City*
7 *of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). While allegations of material
8 fact are taken as true, however, a plaintiff may not rely on conclusory allegations
9 and unwarranted inferences to defeat dismissal. *See e.g., In re Syntex Corp. Sec’s*
10 *Litig.*, 95 F.3d 922, 926 (9th Cir. 1996); *Holden v. Hagoplan*, 978 F.2d 1115, 1121
11 (9th Cir. 1992). Also, the Court does not “assume the truth of legal conclusions
12 merely because they are cast in the form of factual allegations.” *Western Min.*
13 *Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

14 As explained more fully below, this Court should dismiss McKinney’s
15 Complaint because it fails to state a claim upon which relief may be granted.

16
17 **B. McKinney’s Purported Claim Under the False Claims Act (31 U.S.C.**
18 **§ 3729) Provides No Basis Upon Which Relief Can Be Granted.**

19 The Complaint also fails to distinguish among – or even clearly set out – the
20 various claims being alleged. For example, the Complaint mentions an action for
21 retaliation arising under the False Claims Act, 31 U.S.C. § 3729 (“FCA”) in
22 McKinney’s “Statement of the Case” and “Legal Claims,” but no supporting facts
23 even mentioning the FCA can be found in his “Statement of Facts.” [Complaint,
24 2:9-11; 16:8-19.] In fact, McKinney’s reference the FCA contains the following
25 mystifying statements:

26 In 1986, Congress added provisions in 31 U.S.C Sec.
27 3730(h): ‘Any employee who is discharged, demoted,
28 suspended, threatened, harassed, or in any other manner
discriminated against in the terms and conditions of
employment by his or her employer because of lawful

acts done by the employee on behalf of his employer or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.'

[*Id.*, (emphasis added).]

McKinney does not reference anything he did "in furtherance of action under this section." In fact, McKinney does not provide any supporting facts at all for this claim, but rather repeats a statute that does not apply to him under any circumstances. The FCA addresses the situation that if a person attempts to defraud the government to obtain payment/property then he/she will be liable:

to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person [...].

31 U.S.C. 3729(a). For an "action" to exist, however, it may only be brought by the Attorney General or by a private person in the name of the United States Government. 31 U.S.C. §§ 3730(a), (b). Moreover, there are special requirements for a private person to bring an action under the FCA that McKinney never did. In pertinent part:

(b) Actions by Private Persons.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

Snell & Wilmer

—L.P.—

LAW OFFICES
600 Anron Boulevard, Suite 1400
Costa Mesa, California 92626-7689
(714) 427-7000

C. McKinney's Purported Claim Under Title VII of the Civil Rights Act of 1964 and amendments to Title VII of the Civil Rights Act of 1991 (42 U.S.C. § 2000e) Provides No Basis Upon Which Relief Can Be Granted.

McKinney's Complaint similarly fails to state a claim for violation of Title VII of Civil Rights Act, as amended ("Title VII"). McKinney asserts that he suffered "discriminatory behavior" and was retaliated against in violation of Title VII. [Complaint, 2:19-21; 16:20-24.] As with McKinney's claim under the FCA, the only two references to Title VII are found in the "Statement of the Case" and "Legal Claims" and no supporting facts are found in his "Statement of Facts". [*Id.*] In fact, it cannot be determined from McKinney's unintelligible Complaint whether he is alleging disparate treatment, retaliation or both.³

Title VII makes it unlawful for covered employers to hire or discharge any individual, or otherwise discriminate against any individual based on race, color, religion, sex or national origin ("protected class"). 42 U.S.C. § 2000e *et seq.* Yet, McKinney does not allege that he belongs to a class protected under Title VII. To succeed on a retaliation claim, McKinney must have supporting facts to allege: (1) he engaged in some protected conduct (protected by Title VII); (2) he suffered an adverse employment action; and (3) the adverse employment action was taken against him because of the protected activity. *Trent v. Valley Elect. Assoc.*, 41 F.3d 524, 526 (9th Cir. 1994). McKinney does not aver any supporting facts that support his allegations of retaliation in violation of Title VII.

To establish a *prima facie* case of discriminatory treatment,⁴ McKinney must show supporting facts that: (1) he is a member of a protected class; (2) he was capable of performing his job; and (3) he was treated differently because of his

³ It will be assumed that McKinney's Title VII claim is limited to retaliation since this is what he reported to the EEOC. [Declaration of Nathan W. Hicks In Support of Motion to Dismiss Plaintiff's Complaint, Ex. A.]

⁴ As stated above, if McKinney is alleging discrimination, then he has not exhausted the required administrative remedies in order to properly plead this issue.

1 protected class status. *Pejic v. Hughs Helicopters, Inc.*, 840 F.2d 667, 672 (9th Cir.
2 1988). McKinney has alleged no facts in support of his claim of discrimination in
3 violation of Title VII.

4 Additionally, for McKinney to have claims that Apollo retaliated or
5 discriminated against him, he must show that Apollo was his employer since "[t]he
6 liability schemes under Title VII...limit civil liability to the employer." *Miller v.*
7 *Maxwell's International, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993). McKinney has
8 failed to do this. Furthermore, and regarding liability under Title VII for the
9 individually named defendants, McKinney cannot assert facts to support a claim
10 against them since individual defendants cannot be held liable for damages under
11 Title VII. *Id. citing to Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982).

12 Accordingly, McKinney has not properly alleged an action under Title VII
13 upon which relief can be granted.

14
15 **D. McKinney's Other Purported Claims Provide No Basis Upon Which**
16 **Relief Can Be Granted.**

17 Although the Complaint lists seven causes of action⁵ under the section
18 entitled "Legal Claims," the remainder of the Complaint appears to consist of
19 protracted "cut and paste" language⁶ that is internally inconsistent, ambiguous and
20 fails to provide any support for the purported claims listed in the caption. Instead,
21 McKinney simply lists five other causes of action with no factual support or legal
22 basis.⁷

23
24
25 ⁵ None of McKinney's causes of action distinguish what actions are purportedly
attributable to what defendant.

26 ⁶ The same language is found in McKinney's EEOC complaint. [Hicks Decl., Ex.
A.]

27 ⁷ McKinney simply lists: wrongful termination, false imprisonment, intentional
28 infliction of emotional distress, defamation and equal pay under the remaining
causes of action without any reference to a legal basis or how these causes of action
apply to him.

1 To the extent McKinney is asserting these or any other claims against Apollo
 2 (which is, itself, unclear from the wording of the Complaint), McKinney has failed
 3 to describe these claims with any specificity or to set forth the required elements of
 4 those claims. Accordingly, Apollo is unable to determine which claims are being
 5 alleged against it, and McKinney failed to state any claim upon which relief can be
 6 granted.

7
 8 IV.

9 **THE COURT SHOULD DISMISS THE COMPLAINT**
 10 **BECAUSE IT FAILS TO COMPLY WITH FRCP RULE 8.**

11 FRCP Rule 8 requires a plaintiff to set forth "a short and plain statement of
 12 the claim showing that the [plaintiff] is entitled to relief." FRCP Rule 8(a)(2).
 13 Similarly, each claim must be "simple, concise, and direct." FRCP Rule 8(e)(2).
 14 These rules are designed to ensure that a complaint gives fair notice to defendants
 15 and states the elements of the claim plainly and succinctly. *Jones v. Cmty.*
 16 *Redevelopment Agency of the City of Los Angeles*, 733 F.2d 646, 649 (9th Cir.
 17 1984).

18 When the complaint is written by a *pro se* litigant, these rules are relaxed and
 19 the complaint is held to a less stringent standard. *Eldridge v. Block*, 832 F.2d 1132,
 20 1136 (9th Cir. 1987). Nevertheless, if a complaint contains nothing more than
 21 conclusory allegations, unsupported by any facts, it fails to state a claim under
 22 Rule 8. *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th Cir. 1977); se also,
 23 *Barsella v. United States*, 135 F.R.D 64, 66 (S.D.N.Y 1991) (policy requiring
 24 courts to liberally construe *pro se* complaints "does not mandate that a court system
 25 sustain every *pro se* complaint even if it is incoherent, rambling, and unreadable").
 26 Here, McKinney's complaint is incoherent, rambling, unreadable and fails to
 27 comply with Rule 8.

28 ///

1 The Complaint fails to distinguish among – or even clearly set out – the
 2 various claims being alleged.⁸ And, despite containing a heading entitled
 3 “Statement of Facts,” the body of the Complaint is prolix, confusing, and in many
 4 areas – meaningless. Further, it is not clear what relief McKinney seeks or how the
 5 allegations support the relief sought. The Complaint is simply a recitation of
 6 disconnected ideas wrapped with conclusory allegations seeking some sort of
 7 unintelligible relief. The Complaint, therefore, fails to comply with Rule 8 and
 8 should be dismissed under FRCP Rule 12(b)(6) for failure to state a claim upon
 9 which relief can be granted.

10
 11 V.

12 **THE COURT SHOULD DISMISS**
 13 **MCKINNEY’S COMPLAINT WITH PREJUDICE.**

14 The factors a court may consider in determining whether to dismiss a
 15 complaint with prejudice under FRCP Rule 41(b) include: (1) the plaintiff’s status
 16 as a pro se litigant; (2) the burden on the defendants and their right to be free from
 17 costly and harassing litigation; (3) the burden confusing and prolix complaints
 18 place on the court system; (4) the strength of plaintiff’s case; and, (5) the feasibility
 19 of less drastic alternatives, such as allowing further amendment. *See, e.g.,*
 20 *McHenry v. Renne*, 84 F.3d 1172, 1179-1180 (9th Cir. 1996); *Nevijel v. North*
 21 *Coast Life Ins. Co.*, 651 F.2d 671, 674-675 (9th Cir. 1981); *Von Poppenheim v.*
 22 *Portland Boxing and Wrestling Commission*, 442 F.2d 1047, 1053 (9th Cir. 1971),
 23 *cert. denied*, 404 U.S. 1039 (1972). Under the circumstances of this dispute, these
 24 factors heavily favor dismissal with prejudice.

25 McKinney has filed a protracted, rambling, incomprehensible Complaint that
 26 utterly fails to allege any facts to support any of his claims, and that is not even

27 ⁸ See Part III above for a further discussion of the deficiencies in McKinney’s
 28 claims.

1 clear as to which claims are being asserted, and against which Defendants.
 2 McKinney cannot assert anything in an amended pleading that will give merit to his
 3 baseless claims. As such, the Court should dismiss McKinney's Complaint with
 4 prejudice pursuant to FRCP Rule 41(b).

5
 6 VI.

7 **ALTERNATIVELY, THE COURT SHOULD REQUIRE MCKINNEY TO**
 8 **FILE A MORE DEFINITE STATEMENT UNDER FRCP RULE 12(E).**

9 If the Court declines to dismiss the Complaint, and either quashes service and
 10 requires McKinney to re-serve the Complaint or finds that service of process was
 11 sufficient under the FRCP and that the Court has jurisdiction over Apollo, the Court
 12 should require McKinney to file a more definite statement.

13 FRCP Rule 12(e) protects defendants from having to guess at the meaning of
 14 complaints like the one brought by McKinney:

15 If a pleading to which a responsive pleading is permitted
 16 is so vague or ambiguous that a party cannot reasonably
 17 be required to frame a responsive pleading, the party may
 move for a more definite statement before interposing a
 responsive pleading.

18 FRCP Rule 12(e).

19 A complaint may state a claim for relief, but may still be so vague and
 20 ambiguous as to require a plaintiff to provide a more definite statement. *See*
 21 *Cellars v. Pacific Coast Packaging, Inc.*, 189 F.R.D. 575, 578 (N.D. Cal. 1981);
 22 *Famolare, Inc. v. Edison Bros. Stores, Inc.*, 525 F. Supp. 940, 949 (E.D. Cal. 1981).
 23 When claims, such as those made by McKinney are so indefinite that the defendant
 24 cannot ascertain the nature of the claim being asserted, a defendant cannot
 25 reasonably be expected to frame a proper response. *Id.*

26 A motion for a more definite statement is appropriate where allegations do
 27 not comply with the pleading requirements identified in FRCP Rule 8. 2 James
 28 Wm. Moore, et al., *Moore's Federal Practice*, 12.36[1] (3d ed. 2000). Under

1 Rule 8, a pleading must give "fair notice on the grounds for the various claims" and
 2 "requires more than empty boilerplate." *Gen-Probe, Inc. v. Amoco Corp.*, 926 F.
 3 Supp. 948, 961 (S.D. Cal. 1988); *see also Conley v. Gibson*, 355 U.S. 41, 47
 4 (1957). Therefore, if a pleading is not "clear enough to provide the defendant with
 5 a sufficient basis to frame a responsive pleading" a more definite statement is
 6 appropriate. *Sec. Dynamics Techs., Inc. v. Active Card Networks, Inc.*, No. 95-
 7 20870SW, 1996 WL 263648, at *1 (N.D. Cal. May 13, 1996).

8 Here, for the reasons set forth above, McKinney's Complaint is so
 9 ambiguous and unintelligible that Apollo cannot reasonably be required to frame a
 10 responsive pleading. Therefore, if the Court does not grant Apollo's Rule 12(b)(6)
 11 motion, the Court should order McKinney to file a more definite statement.

12 VII.

13 CONCLUSION

14 For the reasons stated above, Apollo respectfully requests that the Court
 15 dismiss McKinney's Complaint with prejudice. In the alternative, if the Court finds
 16 service of process met the requirements of the Federal Rules, and the Court declines
 17 to dismiss the Complaint, Apollo respectfully requests that the Court require
 18 McKinney to file a more definite statement.

19 Date: March 7, 2008

20 SNELL & WILMER L.L.P.

21 By: 

22 Christy Joseph

23 Nathan W. Hicks

24 Attorneys for Apollo Group, Inc.

PROOF OF SERVICE*USDC – Southern District, Case No. 07-CV-2373 WQH CAB*

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, California 92626.

On March 7, 2008, I served, in the manner indicated below, the foregoing document described as **APOLLO GROUPS, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT, OR, IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

Chad McKinney Pro Se 6266 Madeline Street, Apt. #61 San Diego, CA 92115	Plaintiff Tel: 619-634-3566
United States District Court Attention: Hon. Judge William Q. Hayes 940 Front Street San Diego, CA 92101	

☒ BY FEDERAL EXPRESS: I caused such envelopes to be delivered by air courier, with next day service, to the offices of the addressees. (C.C.P. § 1013(c)(d)).

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 7, 2008, at Costa Mesa, California.



Anh Dufour

EXHIBIT C

Chad McKinney
Pro Se
6266 Madeline St Apt #61
San Diego, CA 92115
619-634-3566

THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

CHAD MCKINNEY, an individual,

Plaintiff,

v.

APOLLO GROUP INC., UNIVERSITY OF

PHOENIX , a Corporation, MECHELLE
BONILLA, an Enrollment Manager at
UNIVERSITY OF PHOENIX, KYAN
FLYNN, Director of Enrollment at
UNIVERSITY OF PHOENIX, APRIL
ALCORN, an Employee Relations
Consultant at UNIVERSITY OF PHOENIX
CARLYN LINDSTEN, Associate Director of
Enrollment at UNIVERSITY OF PHOENIX

Defendants

CIV. Case No.07-cv-2373

FOR VIOLATION OF FEDERAL
FALSE CLAIMS ACT AND FOR
VIOLATION OF THE
THE CIVIL RIGHTS ACT 1964 AND
THE AMENDMENTS TO TITLE
VII OF THE CIVIL RIGHTS ACT OF
1991

RETALIATION- WRONGFUL
TERMINATION &
EMPLOYMENT DISCRIMINATION
CIVIL ACTION

**Declaration of R.T. Hansell in Support of
Plaintiff's Motion for Default Judgment**

Date: April 7, 2008

Time: 11:00 a.m.

Courtroom: 4

Judge: Hon. William Q. Hayes

Demand for Trial by Jury Pursuant
to U.S. Constitution, 7th Amendment

March 27, 2008

DECLARATION OF R.T. HANSELL IN SUPPORT OF PLAINTIFF'S MOTION FOR
DEFAULT JUDGMENT

I, Bob Hansell, declare as follows:

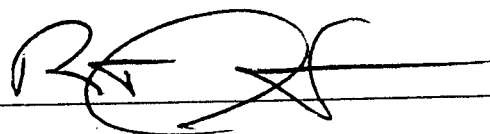
1. I am over the age of 18. I am currently employed as a County Process Server at San Diego Service of Process, LLC in the city of San Diego. On January 31, 2008, I was, and currently am, bonded and registered in and for the County of San Diego.

2. On the 31st of January, 2008, according to Federal Rules of Civil Procedure 4(e)(1) I properly served Apollo Group, Inc., and the University of Phoenix.

3. At the time of service, Ellen Bowens declared herself to be an Administrator and the only person available. Ellen Bowens, who is actually an Operations Manager for the University of Phoenix, a wholly owned subsidiary of Apollo Group, Inc. refused to cooperate and produce the defendant employees for personal service, or any other person to accept for the defendant companies. Substitute service was then effected.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: March 24, 2008


R.T. Hansell, RPS #351